

PUBLIC EMPLOYMENT RELATIONS BOARD
FOR THE STATE OF DELAWARE

GENERAL TEAMSTERS LOCAL UNION 326,	:	
	:	
Charging Party,	:	<u>ULP No. 09-07-691</u>
	:	
v.	:	
	:	
CITY OF REHOBOTH BEACH, DELAWARE,	:	
	:	
Respondent.	:	

BACKGROUND

The City of Rehoboth Beach, Delaware (“City”) is a public employer within the meaning of §1602(l) of the Police Officers and Firefighters Employment Relations Act (“POFERA”), 19 Del.C. Chapter 16 (1986).

General Teamsters Local 326 (“Union”) is an employee organization which admits public employees to membership and has as a purpose the representation of those employees in collective bargaining pursuant to 19 Del.C. §1602(g). The Union is the exclusive bargaining representative of uniformed Rehoboth Beach Police Department employees below the rank of Lieutenant, as certified in Representation Petition 96-10-198 (DOL 218).

The City and the Union are parties to a current collective bargaining agreement which has a term of April 1, 2007 through March 31, 2010.

On or about July 15, 2009, the Union filed an unfair labor practice charge alleging the City had violated 19 Del.C. §1607(a)(5):

(a) It is an unfair labor practice for a public employer or its designated representative to do any of the following:

(5) Refuse to bargain collectively in good faith with an employee

representative which is the exclusive representative of employees in an appropriate bargaining unit.

Specifically, the Charge alleges the City unilaterally changed the terms and conditions of a mandatory subject of bargaining (i.e., the grievance procedure) when it refused to process Corporal Whitman's grievance through the last step of the grievance procedure as set forth in the collective bargaining agreement.¹

On July 27, 2009, the City filed its Answer to the Charge denying the material allegations. The Answer also included New Matter alleging that the Union had filed a "complaint" rather than a "grievance" as defined in §9.2 of the collective bargaining agreement. The City asserts the processing of a complaint terminates with a final and binding decision of the City Manager. §9.5. Consequently the City did not violate either the negotiated grievance procedure or its duty to bargain in good faith.

On or about July 31, 2009, the Union filed its Response denying the New Matter asserted by the City in its Answer.

A probable cause determination was issued on September 2, 2009, finding the pleadings were sufficient to find cause to believe that an unfair labor practice may have occurred. A hearing was conducted on September 29, 2009, during which the parties were afforded the opportunity to create an evidentiary record and to make argument in support of their positions. This decision is based upon the record thus created by the parties.

FACTS

The underlying facts in this case are undisputed. Robert T. Whitman was at all times relevant to this Charge a Corporal in the Rehoboth Police Department and a member of the bargaining unit represented by Teamsters Local 326.

¹ The Union's Charge also included a second count alleging a violation of 19 Del.C. §1607(a)(8) which was withdrawn by letter dated August 5, 2009.

On or about February 3, 2009, the Rehoboth Police Department received a Firearms Relinquishment Notice from the Family Court of Delaware, notifying the Department that an Ex Parte Protection from Abuse order had been issued to Corporal Whitman, directing him to relinquish his weapons on or before 12:01 p.m. on February 4, 2009. The order included an expiration date of February 13, 2009, and specifically required the relinquishment of “shotgun, 4 – 5 handguns (possible Beretta, Smith & Wesson and other unknown types). These weapons are in addition to any service-issued weapons.” *Union Exhibit 2.*

Corporal Whitman relinquished his service weapon to his supervisor, Sgt. O’Bier, after the Rehoboth Police Department was notified of the issuance of the PFA by Family Court. After he left work on February 3, Corporal Whitman met Corporal Riddle at his home, to whom he surrendered his personal weapons, as directed by the PFA.

The following day, February 4, 2009, Corporal Whitman received a phone call requesting him to return to Rehoboth Police headquarters to meet with the Chief of Police. During this meeting, the Chief provided Corporal Whitman with suspension paperwork and directed him to surrender his badge and his credentials. The Chief also told Corporal Whitman he could not return to the police station “until the matter is resolved.” The memo from Chief Banks to Corporal Whitman stated:

On February 3, 2009, I received a temporary Ex Parte Order #0055591, from the Family Court in the State of Delaware, naming you as a respondent.

According to the document, you are prohibited for the duration of the Order from possessing firearms and are ordered to relinquish all weapons.

The very nature of your job requires you to carry a service weapon. Therefore, effective immediately, you are suspended without pay pending court notification reinstating your ability to carry a service weapon.

Due to the nature of the Order, it is your responsibility to notify me of your court date and results. *Union Exhibit 4.*

A grievance was filed by a Teamster Shop Steward on Corporal Whitman's behalf on February 10, 2009, which stated:

As a result of a Temporary Ex Parte Order in which I am the Respondent, I have been placed on Administrative leave without pay. I feel that being suspended without pay is a punishment; however, I have not violated any laws, policies or directives, and do not deserve to be punished for anything.

(Suspended 2-4-09 til lifted) Request Grievant be made whole for lost wages, benefits and fringe benefits. *Union Exhibit 12.*

The Chief of Police responded by denying the claim on February 11, 2009,:

This is in response to a Grievance Complaint I received from you, dated February 11, 2009, on behalf of Cpt. R. Tyler Whitman. Cpl. Whitman is requesting that he be paid for lost wages, benefits and fringe benefits because he feels that being suspended without pay is punishment though he does not feel he violated any departmental policies or directives. He also feels light duty should have been offered.

Per Article 9.3 of the Contract, I have investigated your complaint and find the following: on February 4, 2009, Corporal Whitman was suspended as a result of a temporary Ex Parte Order against him. According to the document, he is prohibited, for the duration of the Order, from possessing firearms. The very nature of his job requires him to carry a service weapon.

It is no fault of the City of Rehoboth Beach that he is involved in a domestic incident. Having received a PFA Order, does indeed violate departmental directives. In addition, there is currently no light duty available. Cpl. Whitman may, however, choose to use his vacation or compensatory time in lieu of time without pay. *Union Exhibit 5.*

On or about February 13, 2009, the Protection from Abuse Order expired and there were no subsequent proceedings before Family Court concerning this matter. All of Corporal Whitman's weapons (both service and personal) were returned to him and he resumed work on February 15, 2009.

At some point thereafter, the matter was appealed to the City Manager, who responded by letter dated March 30, 2009:

In regard to the suspension without pay of 56 hours, I am sorry to inform you that I cannot concur with your request to pay Cpl. Robert Tyler Whitman the suspended hours.

The hours of suspension without pay were:

February 6	12 hours
February 7	12 hours
February 8	12 hours
February 11	8 hours
February 12	12 hours

You are aware that Cpl. Tyler Whitman was issued a protection from abuse order by the Court. Because of the order, Tyler Whitman had to relinquish all firearms (duty weapon and personal weapon). Thus, he could not perform his duties as a City of Rehoboth Beach Police Officer.

Chief Banks did give Tyler Whitman the option to take vacation or comp time in lieu of suspension without pay, but Tyler chose not to do so.

I am sorry that I cannot grant your request. *Union Exhibit 6.*

The matter was again appealed, and a hearing was scheduled and held before the Mayor and Commissioners of the City of Rehoboth Beach on May 15, 2009. The formal decision of the Mayor and Commissioner was issued by the City's Solicitor in a letter dated May 28, 2009, which stated:

A special meeting was conducted by the Mayor and Commissioners of the City of Rehoboth Beach concerning an appeal of the City Manager's decision regarding an action characterized as a grievance filed by Cpl. Whitman and General Teamsters Local Union 326. The decision of the City Manager is dated March 30, 2009 and the appeal was filed on April 3, 2009.

After conducting a hearing on May 15, 2009, the Mayor and Commissioners concluded by unanimous vote of the five members present that the Mayor and Commissioners did not have subject matter jurisdiction to consider the appeal under the Collective Bargaining Agreement (CBA). The decision of the Mayor and Commissioners was based in part upon their determination that the action taken by the Chief of Police and affirmed by the City Manager was not disciplinary in nature, and therefore not subject to Article 7 of the CBA. With that determination having been made, the Mayor and Commissioners concluded that the dispute is appropriately characterized as a "complaint" rather than a "grievance", as those terms are defined in the CBA. Under the CBA, the Mayor and Commissioners do not have subject matter jurisdiction to render a decision concerning complaint. Consequently, the appeal was dismissed. A comprehensive explanation of the Mayor and Commissioners' decision, along with their findings and conclusions, is more fully articulated in the audio recording of the public portion of the special meeting. *Union Exhibit 8.*

The April 1, 2007 – March 31, 2010 collective bargaining agreement between the City of Rehoboth Beach and Teamsters Local Union #326, includes Article 9, Grievance and Complaint Procedure, which states (in relevant part):

- 9.1 Employees shall follow all written and oral orders given by superiors provided however, that such orders are not illegal. Compliance with such orders will not prejudice the right to file a grievance or complaint within the time limits contained herein, nor shall compliance affect the ultimate resolution of the grievance.
- 9.2.1 “Grievance” means any unresolved question or dispute concerning the interpretation or application of this Agreement...
- 9.2.2 “Complaint” means any other unresolved question or dispute not covered in the definition of grievance.
- 9.2.3 A complaint or grievance may be filed by an individual employee, group of employees of the Union...
- 9.3 Grievances and complaints shall be processed in the following manner and in accordance with the following state time limits:
 - 9.3.1 If an informal discussion with the Chief does not result in a satisfactory resolution of the grievance or complaint, the employee(s) or Union may, within ten (10) days after the employee(s) or Union should have reasonably become aware of the circumstances giving rise to the grievance or complaint, submit a written grievance or complaint to the Chief. The grievance or complaint shall be signed by the employee(s) or by the Union Steward and shall state: a) the date of the alleged event(s) which give rise to the grievance; b) if a grievance the specific provisions of the Agreement allegedly violated; c) the facts pertaining to the grievance or complaint; d) the remedy requested. Employees shall be free from reprisal in their presentation of grievances. It shall be the responsibility of the Chief, or the Chief’s designee, to investigate and seek a solution to the problem. The Chief shall discuss the grievance or complaint with the employee, and job steward if involved, and other people who have knowledge of the facts and shall recommend a solution. Upon receiving the grievance or complaint, the Chief shall make a determination in writing within fifteen (15) days.

If an authorized Union Representative determines an adjustment is required to a), b), c), or d) above, the Union representative may, prior to issuance of the 3rd step decision, do so without prejudice to the grievant’s position or the merits of the grievance.

Second Step. If the Union is not satisfied with the Chief's determination, the Union shall then request a meeting with the City Manager within ten (10) days from the receipt of the determination. The City Manager shall investigate the grievance or complaint and discuss the grievance or complaint with the concerned parties. This shall be done within ten (10) days of the City Manager's receipt of the grievance. After investigating the problem, the City Manager shall advise the parties of his or her decision in writing within ten (10) days.

9.5 The decision of the City Manager shall be final and binding as to all complaints.

9.6 Third Step. If the decision of the City Manager as to a grievance is not satisfactory to the Union, it may appeal the decision to the Mayor and Commissioners within ten (10) days from the written date of the City Manager's determination. The Mayor and Commissioners shall be provided with written copies of the reasons for the grievance and the hearing shall be held within thirty (30) days if the appeal is filed more than ten (10) days prior to the next regularly scheduled City Commissioners' meeting. In all events, the hearing may be held at mutually agreeable time. The hearing shall be conducted in Executive Session unless the Freedom of Information Act requires that the hearing be conducted in Public Session. The Union shall be given the right to examine all evidence in a timely manner prior to the hearing. The Commissioners shall review the case, consult with whatever sources deemed appropriate, and within thirty (30) calendar days issue a written decision. Then the City Manager shall, within five (5) days, transmit the decision to the Union.

9.7 If the Union is not satisfied with the Step Three (3) grievance decision of the Mayor and Commissioners, the Union may within sixty (60) calendar days of receipt of the Mayor and Commissioners' written decision file an action in the Superior Court in and for Sussex County... *Joint Exhibit 1.*

ISSUE

WHETHER THE UNDERLYING DISPUTE IN THIS MATTER CONSTITUTES A GRIEVANCE WHICH IS SUBJECT TO THE MANDATORILY NEGOTIATED GRIEVANCE PROCEDURE? IF SO, DID THE CITY COMMIT AN UNFAIR LABOR PRACTICE IN VIOLATION OF 19 DEL.C. §1607(A)(5) BY FAILING OR REFUSING TO PROCESS THE MATTER THROUGH THE NEGOTIATED GRIEVANCE PROCEDURE?

SUMMARY POSITIONS OF THE PARTIES

Teamsters Local 326:

The Teamsters argue the limited question before PERB is whether the actions taken by the City after the PFA was issued by Family Court and Corporal Whitman had surrendered both his service and personal weapons is subject to the contractually negotiated grievance procedure. Specifically, it asserts that whether Corporal Whitman's suspension constitutes discipline is inherently a question of interpretation and application of the collective bargaining agreement.

There is no dispute that the issuance of the PFA was beyond the City's control, but the mandate of the Court's order was that Cpl. Whitman relinquish all weapons. It was the City's decision to suspend him without pay pending resolution of the issues underlying the PFA. The fundamental question to be answered through the grievance procedure is whether the City was permitted to suspend (without pay) a police officer who is unable to carry a weapon under the terms of the collective bargaining agreement.

City of Rehoboth:

The City argues there is nothing disciplinary about Corporal Whitman's suspension; consequently, this dispute does not arise under the terms of the collective bargaining agreement and does not, therefore, constitute a grievance. The Mayor and Council correctly found that this matter is a complaint as it does not draw its essence from interpretation or application of the collective bargaining agreement.

DISCUSSION

The issue presented for resolution in this Charge is limited to a determination as to whether the City instituted a unilateral change in the negotiated grievance procedure by failing or refusing to issue a determination on the merits of the dispute at Step 3 of the negotiated procedure. The Teamsters charge that by not addressing the merits of its grievance, the City acted in violation of its duty of good faith and §1307(a)(5) of the Act. Specifically, the Teamsters charge the underlying issue in this dispute is whether or not the suspension of Cpl. Whitman constituted discipline under the terms of the collective bargaining agreement.

The PERB has consistently held that its jurisdiction may require the interpretation of certain provisions of a collective bargaining agreement where an unfair labor practice charge involves an allegation that requires a determination as to whether a party has unilaterally altered the status quo of a mandatory subject of bargaining. *Local 1590 , IAFF, et al. v. City of Wilmington*, Del.PERB, ULP 89-09-041, I PERB 457, 469 (1990).

There is no dispute or question that grievance procedures are mandatory subjects of bargaining, about which the City and the Teamsters are required to negotiate and reach agreement. Not only is the grievance procedure defined as a term and condition of employment at 19 Del.C. §1602(n), the Act makes the mandate more clear in §1613(c):

The public employer and the exclusive bargaining representatives shall negotiate written grievance procedures by means of which bargaining unit employees, through their collective bargaining representatives, may appeal the interpretation or application of any term or terms of an existing collective bargaining agreement; such grievance procedures shall be included in any agreement entered into between the public employer and the exclusive bargaining representative.

The grievance procedure lies at the heart of the parties' continuous collective bargaining obligation and constitutes the vehicle through which the collective bargaining agreement is defined and refined during its term. For the collective bargaining agreement to

have meaning, it is imperative that the parties consistently and fairly administer their negotiated grievance procedure in accordance with its agreed-upon terms. *Indian River Education Assn. v. Bd. of Education*, Del.PERB, ULP 90-09-053, I PERB 667, 674 (1991).

A determination as to whether a particular dispute falls within the contractual definition of a grievance does not require PERB to consider the substantive merits of the underlying dispute. The parties have defined a grievance to mean “any unresolved question or dispute concerning the interpretation or application of this Agreement...” Article 9.2.1

In this case, the Teamsters allege that the City violated Article 7, Employee Disciplinary Procedures, when it suspended Corporal Whitman without just cause. Section 7.10 defines the purpose of discipline: “... Discipline is for the sole purpose of impressing upon an employee that an improvement is required in a certain area in order for that employee to meet a required level of performance applicable and consistent with the standard prevalent with the majority of other department employees subject to the same standards and condition.” Discipline has also been determined to be a mandatory subject of bargaining, “...matters concerning or related to discipline are a condition of employment and may not be unilaterally altered by either party without negotiation at least to the point of impasse.” *AFSCME Council 81 and Delaware DOT*, ULP 95-01-111A, II PERB 1279, 1290 (1995).

Whether the Disciplinary Procedures (Article 7) of the parties’ agreement were, in fact, violated when the suspension was issued can only be determined by applying and interpreting the terms of the collective bargaining agreement, including the definition of discipline. Therefore, this dispute is a grievance within the clear meaning of Section 9.2.1 of the Agreement. If the suspension did not constitute discipline as defined in the Agreement, the grievance is denied; if it did, Article 7 should be applied and the suspension evaluated there under.

Nothing in the law or the negotiated agreement authorizes the City to unilaterally convert a grievance to a complaint at the third step of the grievance procedure. Doing so violates both the clear language of the grievance procedure and, consequently, violates the statute as well. By refusing to consider the merits of the grievance at Step 3, the City altered the grievance procedure and violated its duty to bargain in good faith.

In order to remedy this unfair labor practice charge, this grievance is remanded to the City for a determination on its merits at Step 3 of the negotiated grievance procedure.

CONCLUSIONS OF LAW

1. The City of Rehoboth Beach, Delaware, is a public employer within the meaning of 19 Del.C. §1602(l).

2. General Teamsters Local 326 is the certified exclusive bargaining representative of a bargaining unit of Rehoboth Beach Police Officers within the meaning of 19 Del.C. §1602(h).

3. The City and the Teamsters are parties to an existing collective bargaining agreement which extends from April 1, 2007 through March 31, 2007.

4. The grievance procedure is a term and condition of employment over which the City and the Teamsters are obligated to collectively bargain. 19 Del.C. §1602(n)

5. Whether the suspension issued to Corporal Whitman constituted discipline requires interpretation and/or application of Article 7, Disciplinary Procedures; consequently, it is grievance as defined by §9.2.1 of the parties' collective bargaining agreement.

6. By failing or refusing to consider the grievance at Step 3, the City unilaterally altered the negotiated grievance procedure and violated its duty to bargain in good faith.

7. Consistent with the foregoing findings and opinion, it is determined that the City's

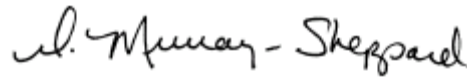
conduct in unilaterally modifying a mandatory subject of bargaining constitutes a *per se* violation of §1607(a)(5) as alleged.

WHEREFORE, THE EMPLOYER IS HEREBY ORDERED TO TAKE THE FOLLOWING AFFIRMATIVE ACTIONS:

1. The City of Rehoboth Beach, Delaware is ordered to cease and desist from engaging in conduct in dereliction of its duty to collectively bargain in good faith with the exclusive bargaining representative of its police employees.
2. The grievance filed by the Teamsters on behalf of Cpl. Whitman is remanded to the Mayor and Commissioners for a decision on its merits as required by Article 9.6 of the parties' collective bargaining agreement.
3. Notify the Public Employment Relations Board within thirty (30) calendar days from the date of this Order of the steps taken to comply with the Order.

IT IS SO ORDERED.

DATE: January 13, 2010



DEBORAH L. MURRAY-SHEPPARD
Executive Director
Del. Public Employment Relations Bd.